DEC 20
MICHAEL RODAK,

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6481

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CLIFFORD H. DAVIS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

No. 72-95

---

LEWIS S. TOLLETT, Warden,

*Petitioner,*

v.

WILLIE LEE HENDERSON,

*Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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# INDEX


PAGE

Interest of Amicus ..... 2

Summary of Argument ..... 3

Argument ..... 4

I—The Requirements for Finding a Waiver of a Fundamental Constitutional Right in Both State and Federal Courts Require an Affirmative Showing That the Defendant Himself Acquiesced in Their Non-Assertion ..... 5

II—The *Johnson-Fay* Requirements Apply With Full Force to Jury Discrimination Claims in Both State and Federal Courts ..... 7

III—Any Rule Imposing an Automatic Forfeiture for Failure to Comply With Rules of Procedure Is Particularly Inappropriate in Jury Discrimination Cases ..... 17

Conclusion ..... 22


## Table of Authorities

*Cases:*


Alexander v. Louisiana, 405 U.S. 625 (1972) .....2, 8, 10, 13

Ballard v. United States, 329 U.S. 187 (1946) ..... 13
Boykin v. Alabama, 395 U.S. 238 (1969) .....10, 11

Carmical v. Craven, 457 F.2d 582 (9th Cir. 1971) .....8, 18
Carnley v. Cochran, 369 U.S. 506 (1962) ..... 11

PAGE

Carter v. Jury Commission, 396 U.S. 320 (1970) .....2, 13
Cassell v. Texas, 339 U.S. 282 (1950) ..... 10
Cobb v. Balkcom, 339 F.2d 95 (5th Cir. 1964) ..... 20

Fay v. New York, 332 U.S. 261 (1947) ..... 13
Fay v. Noia, 372 U.S. 391 (1963) .....passim
Fernandez v. Meier, 408 F.2d 974 (9th Cir. 1969) ..... 14
Frazier v. United States, 335 U.S. 497 (1948) ..... 13

Glasser v. United States, 315 U.S. 60 (1941) ..... 16

Hanratty v. United States, 218 F.2d 358 (5th Cir. 1955) 13
Henderson v. Tollett, 459 F.2d 237 (6th Cir. 1972) ..... 7, 8
Henry v. Mississippi, 379 U.S. 443 (1965) ..... 7
Higgins v. United States, 160 F.2d 222 (D.C. Cir. 1946) 13
Hill v. Texas, 316 U.S. 400 (1942) ..... 10
Humphrey v. Cady, 405 U.S. 504 (1972) .....3, 7, 8

Jackson v. Denno, 378 U.S. 368 (1964) ..... 7
Johnson v. Zerbst, 304 U.S. 458 (1938) .....passim

Kaufman v. United States, 394 U.S. 217 (1969) ..... 6

Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966) ..... 6

McNeil v. North Carolina, 368 F.2d 313 (4th Cir. 1966) 8
Miranda v. United States, 255 F.2d 9 (1st Cir. 1958) .... 13

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) ..... 18
Neal v. Delaware, 103 U.S. 370 (1881) ..... 9
Norris v. Alabama, 294 U.S. 587 (1935) ..... 9

Patton v. Mississippi, 332 U.S. 463 (1947) ..... 2, 8
Peters v. Kiff, 407 U.S. 493 (1972) ..... 16
Pierre v. Louisiana, 306 U.S. 354 (1939) ..... 10

PAGE

Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966) ..... 19
Rice v. Olson, 324 U.S. 786 (1945) ..... 10, 11

Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968) ..... 18
Sanders v. United States, 373 U.S. 1 (1963) ..... 6, 9, 14, 16
Scales v. United States, 367 U.S. 203 (1961) ..... 13
Shotwell Manufacturing Co. v. United States, 371 U.S. 341 (1963) ..... 12, 13, 14, 15
Smith v. Yeager, 465 F.2d 272 (3rd Cir. 1972) ..... 19
Sobol v. Perez, 289 F.Supp. 392 (E.D. La. 1968) ..... 18
Strauder v. West Virginia, 100 U.S. 303 (1880) ..... 8

Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) ..... 13

United States ex rel. Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959) ..... 20
United States ex rel. Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962) ..... 20

Wade v. Yeager, 377 F.2d 841 (3rd Cir. 1967) ..... 8
Whitus v. Balkcom, 333 F.2d 496 (5th Cir. 1964) ..... 8, 9, 20
Winters v. Cook, 466 F.2d 1393 (5th Cir. 1972) ..... 11, 20

*Statutes:*

28 U.S.C. §§ 1861-1864 ..... 15, 19
28 U.S.C. § 1867 ..... 15
28 U.S.C. § 2254 ..... 4
28 U.S.C. § 2255 ..... 4, 12, 13, 15
Fed. Rules Crim. Proc., Rule 12(b)(2) ..... 4, 12, 13, 14, 15, 16

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## BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

## Interest of Amicus*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

Over a long period of time, LDF attorneys have handled, here and in other courts, many cases involving the unconstitutional exclusion of blacks from jury venires.** Throughout this period, LDF has handled many jury discrimination cases in which our help has been sought only after blacks have been convicted and in which the issue was not raised at trial by their then counsel. This experience has demonstrated to us the vital importance of the availability of federal post-conviction remedies as often the only

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* Letters of consent from counsel for the petitioners and the respondents in both of these cases have been filed with the Clerk of the Court.

** *E.g., Patton* v. *Mississippi*, 332 U.S. 463 (1947); *Sims* v. *Georgia*, 389 U.S. 404 (1967); *Carter* v. *Jury Commission of Greene County*, 396 U.S. 320 (1970); *Turner* v. *Fouche*, 396 U.S. 346 (1970); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972).

available mode to vindicate the most blatant violations of a fundamental right. Therefore, LDF has a particular interest in the outcome of these cases since they raise serious questions as to the continued vitality of both habeas corpus and motions under 28 U.S.C. § 2255 as vehicles by which LDF may carry out its purpose.

## Summary of Argument

### I.

This Court has held, in a consistent line of cases from *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), through *Fay* v. *Noia*, 372 U.S. 391 (1963) and *Sanders* v. *United States*, 373 U.S. 1 (1963), to *Humphrey* v. *Cady*, 405 U.S. 504 (1972), that a waiver of fundamental constitutional rights can not be presumed from a procedural default. Rather, in a proceeding for post-conviction relief, a federal court can bar relief on the basis of waiver only upon a finding that the defendant himself made a deliberate and understanding decision not to raise the issue at trial.

### II.

These principles apply with full force to claims of jury discrimination arising under the Constitution. In neither of the two cases before the Court has such a deliberate choice on the part of the defendant not to raise a challenge to the indictment on grounds of racial discrimination been demonstrated.

### III.

Strong considerations of public policy militate against the imposition of any rule of forfeiture that would bar black defendants from obtaining post-conviction relief from un-

constitutional jury selection procedures. Lower federal courts have recognized that failure of defense counsel, without acquiescence by defendants, to raise this issue cannot constitute waiver. Any other holding would result in the undermining of 90 years of efforts of this Court to protect the rights of black defendants indicted and convicted by a white-dominated system of justice.

## ARGUMENT

These two cases present to the Court the question whether the rule regarding waiver established by *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), and reiterated in *Fay* v. *Noia*, 372 U.S. 391 (1963), apply in cases raising the claim that blacks have been excluded from grand juries in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Thus, they involve, in the context of both federal and state prosecutions, the standards by which a federal court on collateral relief should determine whether there has been an effective waiver of the right to object to the denial of this fundamental constitutional right by failure to comply with procedural rules as to when such a challenge should be made. In *Davis* v. *United States*, No. 71-6481, the issue is whether the simple failure to comply with Rule 12(b)(2) of the Federal Rules of Criminal Procedure in and of itself constitutes a waiver barring relief in a 28 U.S.C. § 2255 proceeding. *Tollett* v. *Henderson*, No. 72-95, involves the question as to whether the failure to comply with a similar Tennessee court rule also militates against a defendant being able to raise the claim on habeas corpus brought pursuant to 28 U.S.C. § 2254.

Despite the fact that one case is a federal and the other is a state prosecution, *amicus* urges that both are governed by the rule laid down in *Johnson* v. *Zerbst*, *supra*, that

"'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights" and that they "'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." 304 U.S. at 464.

## I

### The Requirements for Finding a Waiver of a Fundamental Constitutional Right in Both State and Federal Courts Require an Affirmative Showing That the Defendant Himself Acquiesced in Their Non-Assertion.

*Johnson* v. *Zerbst* itself was a collateral attack on a federal conviction, the issue being whether the defendant had waived his right to representation by counsel guaranteed by the Sixth Amendment to the Constitution of the United States. The lower courts had essentially held that the procedural default of the defendant in failing to request appointment of counsel at trial barred relief in the collateral proceeding. This Court unequivocally rejected such a view. Rather, it held that in any case the question was whether there had been "an intelligent waiver" of the right involved and that that finding could be made only after an examination of the particular facts and circumstances surrounding the case demonstrated that the defendant affirmatively decided to forego the right in question. Thus, the mere failure affirmatively to assert the right was not enough to bar collateral relief. 304 U.S. at 464.

The *Johnson* rule was reaffirmed in the strongest possible terms in *Fay* v. *Noia, supra,* which involved a state prosecution, and which held that in a proceeding for col-

lateral relief in federal court, waiver could not be presumed by failure to pursue or follow a particular rule of procedure. To follow such a rule of forfeiture would be to "introduce legal fictions into federal habeas corpus."[1] Thus, the inquiry required by a federal court is to determine:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as a deliberate bypassing of state procedures. . . .
> 372 U.S. at 439.

Then, and only then, "it is open to the federal court on habeas to deny him all relief." *Ibid.* The court reemphasized that the standard required "the considered choice of the petitioner. . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief."

Shortly after the decision in *Fay*, this Court completed the circle by making it clear that the *Fay* standards applied equally in a 28 U.S.C. § 2255 proceeding. *Sanders* v. *United States*, 373 U.S. 1, 18 (1963). And see, *Kaufman* v. *United States*, 394 U.S. 217, 228 (1969). As recently as last term, this Court, by a unanimous seven-member panel, reaffirmed that the requirements of *Johnson* and *Fay* were still the law and stated: "If the District Court cannot find persuasive evidence of a knowing and intel-

[1] As the Fifth Circuit has put it, in a case involving jury discrimination: "The 'waiver' asserted in this case is simply a diaphanous euphemism for forfeiture of rights resulting from a procedural default." *Labat* v. *Bennett*, 365 F.2d 698, 707 (5th Cir. 1966).

ligent waiver on the part of petitioner himself, then the Court should proceed to consider petitioner's constitutional claims." Therefore, a defendant "is not necessarily bound by the decision or default of his counsel." *Humphrey* v. *Cady*, 405 U.S. 504, 517 (1972).

## II

### The *Johnson-Fay* Requirements Apply With Full Force to Jury Discrimination Claims in Both State and Federal Courts.

We have set out above the general rule for determining whether there has been a waiver of a fundamental constitutional right. In its terms, the *Johnson-Fay* rule applies to all such rights without exception,[2] and it has in fact been applied in a variety of circumstances. See, *e.g.*, *Jackson* v. *Denno*, 378 U.S. 368, 370 n. 1 (1964) (challenge to procedural rules governing admission of confessions; the *Fay* rule provides "the *only* ground for which relief may be denied in federal habeas corpus for failure to raise a federal constitutional claim in the state courts" (emphasis added)); *Henry* v. *Mississippi*, 379 U.S. 443, 450 (1965) (objection to unconstitutionally seized evidence); *Humphrey* v. *Cady*, *supra* (objection to procedures for commitment as a sex crime offender).

It is clear that the same principle also must apply in cases involving the right to object to discrimination in the selection of juries. It is no overstatement to assert that perhaps no other constitutional right has been recog-

[2] "Nothing in *Fay* v. *Noia* suggests that the Supreme Court intended to establish a hierarchy of constitutional protections and limit the applicability of the classic definition of waiver to those rights occupying the highest positions." *Henderson* v. *Tollett*, 459 F.2d 237, 239 (6th Cir. 1972).

nized by this Court for so long as being absolutely fundamental to the requirements of due process and equal protection. From *Strauder* v. *West Virginia*, 100 U.S. 303 (1880) through *Alexander* v. *Louisiana*, 405 U.S. 625 (1972), this Court has held repeatedly that racial discrimination in the selection of juries violates the most fundamental right to be tried by a system of justice free of racial bias. See also, *Patton* v. *Mississippi*, 332 U.S. 463 (1947), and cases cited at 465 n. 3. The right fully encompasses indictment by grand jury, *Alexander* v. *Louisiana*, 405 U.S. at 626 n. 3.

The applicability of *Johnson* and *Fay* has been duly recognised by federal courts when faced with questions of jury discrimination by states in violation of the Fourteenth Amendment. Indeed, the circuit courts have been unanimous in holding that the right is of the fundamental character contemplated by *Johnson*, and that therefore the failure to comply with state procedural rules will not in and of itself result in a waiver of the right to object to discrimination. Rather, the burden is on the state to demonstrate by affirmative evidence that the decision not to challenge the composition of either the grand or petit jury was deliberately made by the defendant himself with full understanding of the consequences thereof, free from any countervailing coercive pressures. See, *e.g.*, *Wade* v. *Yeager*, 377 F.2d 841 (3rd Cir. 1967); *McNeil* v. *North Carolina*, 368 F.2d 313 (4th Cir. 1966); *Whitus* v. *Balkcom*, 333 F.2d 496 (5th Cir. 1964); *Henderson* v. *Tollett*, 459 F.2d 237 (6th Cir. 1972); *Carmical* v. *Craven*, 457 F.2d 582 (9th Cir. 1971).

We urge, therefore, that the Sixth Circuit in *Tollett* was correct in its refusal to impose a rule of forfeiture, particularly in view of the facts of the case. Both the district court and the court of appeals conducted precisely the inquiry required by *Johnson*, *Fay*, and *Humphrey*. They

found that not only the petitioner, but his counsel were unaware of even the possibility of challenging the composition of the grand jury, and that the idea would not have occurred to *any* Tennessee lawyer at the time. Therefore, there was clearly no decision at all on the matter, let alone one made for tactical reasons.[3]

None of the State's grounds for escaping the application of *Johnson* and *Fay* are persuasive. The argument that the jury selection methods used in 1948 were not unconstitutional under the prevailing law at the time is simply wrong. No blacks ever served on a grand jury in the history of the county until 1953, five years after Henderson's indictment, in a county more than 25% black. This was precisely the kind of facts held to establish a *prima facie* case of jury discrimination in *Norris* v. *Alabama*, 294 U.S. 587 (1935), and *Neal* v. *Delaware*, 103 U.S. 370 (1881), decided thirteen and sixty-seven years, respectively, before the indictment was handed down in this case.

The argument that Henderson's counsel may not have raised the issue because he decided it would be futile to do so because of recent decisions of the Tennessee Supreme Court is not supported by the record. To the contrary, it

[3] Indeed, with one exception, it is difficult to imagine *any* constitutionally acceptable tactical reason for not challenging racial discrimination in the composition of juries. Fear of arousing hostility in the white community on the part of counsel is not, of course, an acceptable reason for not making a challenge, see *Whitus* v. *Balkcom*, 333 F.2d 496 (5th Cir. 1964), *cf.*, *Fay* v. *Noia*, 372 U.S. at 439-440, despite the State of Tennessee's assertions to the contrary here (Brief for Petitioner in No. 72-95, p. 6). The one exception would be a case where counsel and the defendant deliberately decided not to object to the array on the hope of getting a second opportunity to contest a conviction if an appeal on other grounds failed. Such a state of facts might well amount to an abuse of the remedy of habeas corpus or 2255 within the meaning of *Sanders* v. *United States*, 373 U.S. 1, 9-11 (1963). In neither of the two cases before the court was such an abuse either pleaded or proven.

simply never occurred to counsel that any such claim existed.[4]

Finally, the fact that Henderson pleaded guilty to the crime charged does not put him in a different position *vis-a-vis* his right to challenge his indictment than a defendant who has gone to trial. This Court has repeatedly held that the right to challenge an unconstitutional grand jury is independent of the right to challenge the petit jury, and that the same principles apply to each. See, *Alexander* v. *Louisiana*, 405 U.S. at 626, n. 3. Thus, it has rejected the position that discrimination in the selection of the grand jury is of no moment since an indictment is not a conviction and any defect is cured by trial before a constitutionally acceptable petit jury. *Pierre* v. *Louisiana*, 306 U.S. 354 (1939). See also, *Hill* v. *Texas*, 316 U.S. 400, 406 (1942). No more than does a judgment of guilty by a jury, after a full trial (see, *Cassell* v. *Texas*, 339 U.S. 282 (1950), does a plea of guilty wipe out the action of an unconstitutional grand jury.[5]

Furthermore, it cannot be maintained that the plea of guilty itself operated as a waiver of all objections to constitutional infirmities in the proceeding. Such a contention

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[4] Even if supported by the evidence, the argument proves too much. Surely, counsel's decision, not acquiesced in by the defendant, not to raise a valid issue because he thought it could not be won, is not a decision made by the defendant with knowledge of what he is surrendering as contemplated by *Johnson* and *Fay*.

[5] If anything, the opposite should be the case. If in fact a defendant has had a trial before a constitutionally adequate petit jury it would be at least appear that there is not the kind of abrogation of Fourteenth Amendment rights of black defendants by the entire judicial system. This court has indicated that particular attention must be given to guilty plea cases to ensure that there has been no violation of constitutional rights, precisely because the defendant has given up the procedural protections inherent in a jury trial. See, *Boykin* v. *Alabama*, 395 U.S. 238, 242-44 (1969); *Rice* v. *Olson*, 324 U.S. 786 (1945).

was specifically rejected by this Court in *Rice* v. *Olson*, 324 U.S. 786 (1945). There, the Court rejected the position that when a defendant pleads guilty it can be presumed that he "'absolutely' and finally" waived his right to be represented by counsel. 324 U.S. at 788. It was noted that the holding of the state court was based on the proposition that such a plea "'operates as a waiver of any defense, and . . . with it, of course, the constitutional guarantees with respect to the conduct of criminal prosecutions.'" *Id.*, n. 2.

This Court held to the contrary, pointing out that such a presumption could not be maintained in the face of an allegation by the defendant in his petition for collateral relief that he did *not* waive the right in question. That allegation "squarely raised a question of fact" that could not be resolved by any presumption drawn from the bare fact of a guilty plea. Rather, it must be "determined by evidence" going to the issue, *inter alia*, of whether the defendant waived his right "intelligently and understandingly." *Id.* at 788-789. See also, *Carnley* v. *Cochran*, 369 U.S. 506, 515-516 (1962); *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

In *Tollett*, of course, the precise issue is whether Henderson "intelligently and understandingly" gave up his right to challenge the composition of the grand jury. No more than was the case in *Rice* v. *Olson* can that question be resolved by reliance on a presumption attaching to a plea of guilty. Rather, the courts below made the inquiry mandated by *Rice* and determined on the basis of the evidence that no understanding waiver had been made. *Winters* v. *Cook*, 466 F.2d 1393 (5th Cir. 1972).

In summarizing our position with regard to *Tollett*, we urge that the courts of appeals have been correct in deciding waiver questions pursuant to the standards estab-

lished in *Johnson* and *Fay*. This court should therefore affirm the Sixth Circuit's decision, and uphold the courts of appeals' approach in cases raising the issue of the availability of habeas corpus relief in state jury discrimination cases.

Paradoxically, in cases involving *federal* prosecutions, where relief under § 2255 is sought on the basis of jury discrimination, the lower courts have been much less consistent in applying the standards of *Johnson* and *Fay*. The Fifth Circuit in particular, which has been diligent in protecting the rights of *state* prisoners from the application of a strict rule of waiver for non-compliance with procedural rules, has, on the other hand, rigidly applied a rule of forfeiture in federal prosecutions regardless of the circumstances. Thus, in the *Davis* case the court, relying on a series of earlier decisions, held simply that failure to comply with Rule 12(b)(2) of the Federal Rules of Criminal Procedure, operated as an automatice forfeiture of the right of a black defendant to object *on constitutional grounds* to the exclusion of blacks from the grand jury that indicted him.

*Amicus* urges that there is no basis in law or reason for this inconsistent result, but that it flies in the face of this Court's decisions from *Johnson* through *Humphrey*. The Fifth Circuit has mechanically applied the decision in *Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341 (1963), to all instances where a federal defendant has not challenged his jury prior to the time of trial, and we contend that this automatic reliance on *Shotwell* is misplaced and that that case is distinguishable.

In *Shotwell*, corporate defendants raised a question as to the legality of the composition of the jury on the appeal itself some years after the original trial. The grounds for

the challenge in *Shotwell* were based on alleged violations of the federal jury statutes and the defendants relied upon this Court's supervisory power over the administration of those statutes in the lower federal courts. See, *Ballard* v. *United States*, 329 U.S. 187 (1946). The claim was apparently not made that members of the defendants' own class were excluded from jury service, but that, because of improper administrative action, the statutes' requirement that a cross-section of the community be empanelled was not met. Thus, under the law prevailing at the time, the claim made in *Shotwell* was evidently not viewed by this Court as one of constitutional dimension.[6] Similarly, the cases cited with approval in *Shotwell*, 371 U.S. at 362, all deal with challenges based on violations of federal statutory rights as declared by this Court in cases such as *Ballard* v. *United States, supra*, and *Thiel* v. *Southern Pacific Company*, 328 U.S. 217 (1946).[7]

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[6] We do not wish to imply by this discussion of *Shotwell* and the cases it relied upon that we do not believe that there is a right guaranteed by the Constitution to a jury that represents a reasonable cross-section of the community. See, *Carter* v. *Jury Commission*, 396 U.S. 320, 330 (1970). Indeed, our contention would be to the contrary if these cases raised that issue, and we have urged that position before this Court in *Alexander* v. *Louisiana, supra*. The point here, however, is that that proposition was not firmly established at the time of *Shotwell*. See, *Fay* v. *New York*, 332 U.S. 261 (1947).

[7] The cases cited with approval in *Shotwell*, 371 U.S. at 362, all raised claims of statutory violations, and evidently did not urge constitutional ones that were deemed to be substantial. *E.g.*, *Frazier* v. *United States*, 335 U.S. 497 (1948) and *Higgins* v. *United States*, 160 F.2d 222 (D.C. Cir. 1946) challenged juries composed largely of government employees. *Hanratty* v. *United States*, 218 F.2d 358 (5th Cir. 1955) and *Miranda* v. *United States*, 255 F.2d 9 (1st Cir. 1958) challenged the exclusion of women. In *Scales* v. *United States*, 367 U.S. 203 (1961), the challenge was based on procedures alleged to be inconsistent with the statutes; although Rule 12(b)(2) was referred to, the trial court, the Court of Appeals, and this Court all also rejected the claim on the merits. *Id.* at 259.

Thus, this Court in *Shotwell* was not presented with a case raising the question of whether the *Johnson* standard of waiver applied in a collateral proceeding by a black defendant seeking to challange jury discrimination on constitutional grounds arising from the exclusion of blacks from juries. Therefore, it is not surprising that the same court that decided *Fay* two months later and that in the same term held in *Sanders* v. *United States*, 373 U.S. 1 (1963) that the *Johnson-Fay* standards applied in federal collateral proceedings, did not discuss the applicability of *Johnson* v. *Zerbst* in *Shotwell*. For if *Shotwell* and Rule 12(b)(2) are read the Fifth Circuit's way, as creating a rule of forfeiture, they are clearly in conflict with *Johnson*, *Fay* and *Sanders*.

*Sanders* involved the standards for deciding whether a defendant was barred from raising a constitutional claim in a second § 2255 petition that might have been raised in an earlier one. The district court applied what was essentially a rule of forfeiture, and held that the failure to raise the issue at the earlier opportunity operated as a bar. Such a ruling is precisely analogous to the Fifth Circuit's position that a failure to comply with Rule 12(b)(2) operates as a similar bar. This Court in *Sanders* rejected such a rule, and applied the *Fay* holding that a deliberate decision on the part of the defendant not to raise the issue for a tactical or other reason must be shown. Thus, the Ninth Circuit correctly recognized that *Sanders* controlled in its holding that a failure to comply with 12(b)(2) did not operate as an automatic forfeiture of the right to challenge jury discrimination. *Fernandez* v. *Meier*, 408 F.2d 974 (9th Cir. 1969).

The same ground we have discussed for distinguishing *Shotwell* also leads to a conclusion that 12(b)(2) does not conflict with *Johnson* and *Fay*. The rule by its terms allows

a court to find no waiver "for cause shown." That language must be read in conformity with the *Johnson-Fay* rule to mean that sufficient cause is established by: (1) the assertion of a constitutional challenge to the grand jury; and (2) the determination by the court that the defendant himself did not participate "knowingly and understandingly" in a deliberate decision not to raise the issue before trial. Thus, whatever the validity of a rule that would require that ordinarily *statutory* challenges to a grand jury be made pursuant to 12(b),[8] challenges on constitutional grounds must be subject to a different standard.

The Fifth Circuit apparently gave no consideration to this distinction in *Davis*, for his motion filed under § 2255 specifically challenges his grand jury "as being an unconstitutional array" since it did not meet the requirements of "the Fifth Amendment of the United States Constitution" as well as those of the federal jury statutes, 28 U.S.C. §§ 1861-1864. Thus, the Fifth Circuit has adopted precisely the rule rejected by this Court in *Johnson* v. *Zerbst*, and its reliance on *Shotwell* and its reference to Rule 12(b) amounts to a holding that the simple failure to comply

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[8] We note in passing that the 1968 Amendments to the federal jury statutes seem to recognize the distinction between a challenge based on noncompliance with the statutes and challenges based on other grounds and the procedural requirements for mounting such a challenge. 28 U.S.C. § 1867 sets forth the required procedure for challenging noncompliance with sections 1861-1864 and requires that such challenges be made before the *voir dire* examination begins or earlier if the noncompliance was or could have been discovered. Section 1867(e) states that "the procedures prescribed by this section shall be the execlusive means by which a person accused of a Federal crime . . . may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title." The section then goes on to state that it does not preclude the pursuit of other remedies to vindicate any other law, including the Fifth Amendment to the Constitution, prohibiting racial discrimination in the selection of juries.

with that rule in and of itself constitutes a waiver of the constitutional right involved.

It is clear that the lower courts did *not* make the inquiry or find the facts required by *Johnson, Fay* and *Sanders*. The district court placed the burden *on the defendant* to prove somehow that he was not aware of his constitutional rights, and presumed that because of his present legal knowledge and the fact that he had a capable lawyer, he must have known of them. Such a presumption stands *Johnson* on its head, and is, of course, improper. See, *Glasser* v. *United States*, 315 U.S. 60, 70-72 (1942), holding that an *assistant United States attorney* could not be presumed to know of his right to be represented by independent counsel and to have waived it by inaction.

Finally, the lower court's holdings that some special prejudice must be shown in a racial exclusion case in order to escape the requirements of 12(b)(2) cannot be sustained. Whatever may be the validity of that part of the *Shotwell* holding as it relates to the right of persons not of the excluded class to challenge noncompliance with the federal jury statutes, it cannot be the rule in the case of a black defendant challenging the unconstitutional exclusion of blacks.

Indeed, it is clear that a defendant of any race can challenge the exclusion of blacks without any showing of particularized prejudice to him, *Peters* v. *Kiff*, 407 U.S. 493 (1972). In *Peters*, this Court rejected, in the context of a state prosecution, the argument that a white defendant had to show such prejudice because he had not challenged the exclusion of blacks from his jury until he sought collateral relief. The Court held that the fundamental impossibility of demonstrating such prejudice made it unfair to place such a burden on the defendant in a situation where the state was responsible for the continuation of practices that were unconstitutional.

## III

**Any Rule Imposing an Automatic Forfeiture for Failure to Comply With Rules of Procedure Is Particularly Inappropriate in Jury Discrimination Cases.**

In parts I and II of this brief, we have set out the general rule regarding the waiver of constitutional rights and have explained why it applies to jury discrimination cases under the rationale of *Johnson* and *Fay* since they involve a fundamental constitutional right as contemplated by those decisions. Here we urge that other considerations peculiar to the problems raised by racial discrimination in the selection of juries dictate that as a matter of policy a strict rule of forfeiture may not be permitted. This is because jury discrimination by its nature has been a systematic, institutionalized defect in the administration of justice in this country, despite 90 years of pronouncements by this Court.

*Amicus* has a special concern with the problem of racial discrimination in the selection of both grand and petit juries, not only in the South but throughout the United States. In our statement of interest, *supra,* we have noted a long-standing involvement in jury discrimination problems in cases before not only this Court but in lower courts, both state and federal. Because of our experience, we are often contacted by black prisoners who wish assistance in challenging their indictments or convictions because of such discrimination. These requests for help show a consistent pattern which is typified by the two cases before the Court.

A black defendant, without resources and with little knowledge of his legal rights at the beginning of his prosecution, is represented by either retained or court-appointed

counsel, usually white. He is indicted and goes to trial, at which point he may for the first time realize that he is faced with an all or virtually all-white jury array. Of course, he has had no way of knowing the racial composition of the grand jury that indicted him. In most instances, his counsel does not mount a challenge to the jury system as it relates either to the grand or petit jury and the black defendant becomes aware of his right to do so only after he has been convicted and incarcerated and subsequently becomes more acquainted with his legal rights.

The reasons why jury discrimination challenges have not been made more often, despite the evident fact that they could have been in virtually every prosecution brought in southern states and in a substantial portion of those brought in northern states, are not difficult to ascertain. The number of black lawyers and white lawyers cognizant of civil rights issues, those who would be most apt to be concerned about the problem, has been and remains small, particularly in southern states. See, *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 443 (1963), *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968), *Sobol* v. *Perez*, 289 F.Supp. 392 (E.D. La. 1968).

Thus, black defendants are in the main represented in the first instance by white attorneys whose main experience is with representing white clients. Unfortunately, these lawyers simply do not raise jury discrimination issues in the large run of cases. In the northern states, and now in some southern states, this may be because of the failure to recognize that there in fact may be a problem. This is not surprising because the typical northern situation involves not so much the kind of deliberate discrimination typical of many southern jurisdictions, but rather the use of various devices that have the effect of excluding black jurors. See, *Carmical* v. *Craven*, 457 F.2d 582 (9th Cir. 1971),

*Smith* v. *Yeager*, 465 F.2d 272 (3rd Cir. 1972). With few exceptions, it has only been in recent years that such practices have come to light and their constitutional significance has been recognized.

The same pattern, we believe, also explains the relatively few challenges on racial exclusion grounds to jury selection methods in federal courts. The pattern there again has not been by and large deliberate exclusion of blacks but rather the utilization of selection methods, such as the key-man system, which, however inadvertently, have had the effect of excluding blacks. See, *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. 1966). In *Davis* v. *United States*, of course, precisely such a contention, together with allegations of deliberate exclusion, was made.[9]

In southern jurisdictions ignorance of the possibility of challenging grand and petit juries has in the past, unfortunately, been coupled with the deliberate neglect or tacit acquiescence of white attorneys in the maintenance of an exclusionary jury system. *Tollett* v. *Henderson* presents a vivid example of such a case. Counsel who represented Henderson in Tennessee in 1948 frankly admitted that it simply never occurred to him to challenge racial discrimination in the jury selection system. Similarly, Judge Galbreath of the Court of Criminal Appeals of Tennessee, in his concurring opinion in respondent's collateral proceeding in that court, stated:

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[9] Congress itself has long grappled with problems arising from the racially exclusionary effects of key-man and similar systems in the federal courts. The result of this concern was the passage of the 1968 Jury Selection Act, 28 U.S.C. § 1861 et seq., which sets up a random system of selection from sources which are designed to produce as full a cross-section of the community as possible. With the implementation of this act, jury discrimination problems in the federal courts have, with a few exceptions, been largely eliminated. Petitioner Davis, of course, was indicted and tried prior to the effective date of the 1968 reform.

> No lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948, just as scarcely anyone objected to the complete segregation of all public and private facilities of any kind in the State until the next decade. 459 S.W.2d 176, 179-180.

Similarly, the Fifth Circuit has taken judicial notice of the fact that white lawyers simply would not raise the issue because of ignorance of the issue, because of fear of raising hostility in the community, or because of acquiescence in the system. See, *United States ex rel. Goldsby* v. *Harpole*, 263 F.2d 71, 82-83 (5th Cir. 1959); *United States ex rel. Seals* v. *Wiman*, 304 F.2d 53, 68-69 (5th Cir. 1962); *Whitus* v. *Balkcom*, 333 F.2d 496 (5th Cir. 1964); *Cobb* v. *Balkcom*, 339 F.2d 95 (5th Cir. 1964); *Winters* v. *Cook*, 466 F.2d 1393 (5th Cir. 1972).

In light of these realities, a rule that essentially operates as a forfeiture of the right to challenge discrimination in the selection of grand, and presumably petit, juries would mean that blacks would be condemned to remain in prison without recourse even though they were indicted and convicted under procedures blatantly unconstitutional, adhered to in the face of decisions of this Court going back to 1880. These defendants would be placed in this situation through no fault of their own but simply because of defense counsel's essential acquiescence in the system, or their ignorance of the possibility of challenging it.

Thus, these cases concern a fundamental and institutionalized defect in the system of justice that simply cannot be compared to, for example, a decision in a particular case to forego challenging evidence as unconstitutionally seized, or a statement as unconstitutionally coerced. It would be unconscionable to place the burden of the legal

profession's failure to attack this problem on the shoulders of the very persons that this Court has been endeavoring to protect for 92 years.

These considerations also require that the prosecution's claim of an interest in the finality of criminal convictions be rejected. The problem of jury discrimination is one peculiarly within the state's power to correct. It is not a question of the malfeasance or mistake of one police officer in seizing evidence, or of an interrogator or prosecutor overstepping the bounds set by the Constitution in obtaining a confession, on a single judge making an erroneous decision as to a constitutional question arising from the particular facts of a particular case. Rather, an entire system has been maintained with full knowledge of its unconstitutionality, with the active participation of all elements of the very institutions supposed to be on the side of justice, including judges, district attorneys, court personnel, and, unfortunately, in many cases defense counsel. The institutions of government have chosen to violate the Constitution of the United States, not in one individual case, but in every case involving every defendant brought before it. If any party has waived or forfeited its right to insist on a particular interest it is the government itself, and this Court should ensure that all persons convicted under unconstitutional systems of jury selection be able to gain relief, unless they themselves, with full knowledge of the consequences, deliberately chose to forego their rights.

## CONCLUSION

For the foregoing reasons, the decision in No. 71-6481 should be reversed and that in No. 72-95 affirmed.

Respectfully submitted,

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# BRIEF FOR RESPONDENT

DEC 27 1972

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-95

LEWIS S. TOLLETT, Warden
Tennessee State Prison,

*Petitioner,*

v.

WILLIE LEE HENDERSON,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## BRIEF FOR THE RESPONDENT

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# TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| QUESTION PRESENTED | 2 |
| STATEMENT OF THE CASE | 3 |
| SUMMARY OF ARGUMENT | 4 |
| ARGUMENT: | |
| I. Blacks Were Unconstitutionally Excluded Systematically From Grand Jury Duty in Davidson County, Tennessee When Respondent Was Indicted, and Petitioner Admitted This Fact in Both the District Court and the Court of Appeals, Thereby Abandoning and Waiving His Right to Argue That Issue Before this Court | 6 |
| II. Did Respondent's Failure To Object Before Pleading to the Indictment Returned By A Grand Jury From Which Members of His Race Had Been Systematically Excluded in Violation of the Equal Protection Clause of the Fourteenth Amendment Constitute a Waiver of His Right to Challenge the Composition of that Grand Jury in Subsequent Federal Habeas Corpus Proceedings When Neither He Nor His Attorney Had Been Aware of the Right Before the Plea was Entered? | 13 |
| A. The Rule Requiring Challenge Before Plea | 13 |
| B. The Rationale of the State Prisoner Habeas Cases | 14 |

C. The Facts in the Instant Case Clearly Show that the Judgment Below Should Be Affirmed ..... 17

III. Does Systematic Exclusion of Members of a Particular Race from Jury Service Constitute a Jurisdictional Defect? ..... 24

CONCLUSION ..... 25

## TABLE OF CITATIONS

*Cases:*

Avery v. Georgia, 345 U.S. 559 (1963) ..... 10

Bannister v. United States, 446 F.2d 1250 (3d Cir. 1971) ..... 18n

Bonds v. State, 421 S.W.2d 87 (1967) ..... 8, 24

Brady v. United States, 397 U.S. 742 (1970) .....17, 18n

Carnley v. Cochran, 369 U.S. 506 (1962) ..... 18

Cobb v. Balkcom, 339 F.2d 95 (5th Cir. 1964) .....15, 16n

Colson v. Smith, 315 F. Supp. 179, 438 F.2d 1075 (5th Cir. 1971) .....14, 24, 25

Drop Dead Co. v. S.C. Johnson & Sons, 326 F.2d 87 (9th Cir. 1963), cert. den. 377 U.S. 907 ..... 9

Eubanks v. Louisiana, 356 U.S. 584 (1958) .....10, 24

Fay v. Noia, 372 U.S. 391 (1963) ..... *passim*

Henry v. Mississippi, 379 U.S. 443 (1965) ..... 17

Humphrey v. Cady, 405 U.S. 504 (1972) ..... 18

In re Donnelly's Estate, 397 U.S. 286 (1970) ..... 9

Johnson v. Zerbst, 304 U.S. 458 (1938)..... *passim*

Kennedy v. State, 186 Tenn. 310, 210 S.W.2d 132 (1948) cert. den. 333 U.S. 846 .....9-11

Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966) ..... 15

McMann v. Richardson, 397 U.S. 759 (1970) .....17, 18n

McNeil v. North Carolina, 368 F.2d 313 (4th Cir. 1966) ..... 15, 16n, 17
Norris v. Alabama, 294 U.S. 587 (1935) ..... 10
Patton v. Mississippi, 332 U.S. 463 (1947) ..... 10, 24
Peters v. Kiff, 407 U.S. 493 (1972) ..... *passim*
Scogin v. United States, 446 F.2d 416 (8th Cir. 1971) ..... 18n
State ex. rel. Henderson v. Russell, 459 S.W.2d 176 (1970) ..... 21
State ex. rel. Lawrence v. Henderson, 433 S.W.2d 96 (1968) ..... 13
State v. Kagabein, (Ark. S.Ct. #5665) ..... 12
Strauder v. West Virginia, 100 U.S. 303 (1880) ..... 10, 12
United States v. Harpole, 263 F.2d 71 (5th Cir. 1959), cert. den. 361 U.S. 838 ..... 15, 21
United States v. Liquori, 430 F.2d 842 (2d Cir. 1970) ..... 18n
United States ex rel. Rogers v. Warden, Attica State Prison, 381 F.2d 209 (2d Cir. 1967) ..... 17
United States v. Spector, 343 U.S. 169 (1952) ..... 9
Wade v. Yaeger, 377 F.2d 841 (3d Cir. 1967) ..... 15
Walters v. City of St. Louis, Mo., 347 U.S. 231 (1954) ..... 9
Washington v. United States, 401 F.2d 915 (DC 1968) ..... 14
Whippler v. Balkcom, 342 F.2d 388 (5th Cir. 1965) ..... 15
Whitus v. Balkcom, 333 F.2d 496 (5th Cir. 1964) ..... 21
Whitus v. Georgia, 385 U.S. 545 (1967) ..... 8, 10
Winters v. Cook, 466 F.2d 1393 (5th Cir. 1972) ..12, 21-23, 25
Windom v. Cook, 423 F.2d 721 (5th Cir. 1970) ..... 15

*Other Authorities:*

18 U.S.C. §243 ..... 25
28 U.S.C. §2241 ..... 2

**Constitution of the United States**
**Fourteenth Amendment** ..... *passim*
**Federal Rules of Criminal Procedure, Rule 12(b)(2)**..... 13

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

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No. 72-95

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LEWIS S. TOLLETT, Warden
Tennessee State Prison,
*Petitioner,*

v.

WILLIE LEE HENDERSON,
*Respondent.*

---

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

## BRIEF FOR THE RESPONDENT

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 459 F.2d 237, and appears in the Petition for Certiorari at page 1a. The opinion of the United States District Court for the Middle District of Tennessee is reported at 342 F. Supp. 113, in the Petition for Certiorari at page 13a, and in the Appendix at page A. 21.

## JURISDICTION

Jurisdiction is vested in this Court by virtue of the order herein granting certiorari on October 16, 1972, and is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

The Federal habeas corpus statute, Title 28, United States Code, § 2241, provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless–
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

## QUESTION PRESENTED

Whether a semiliterate black youth of 20, unaware of his right to object to his 1948 indictment for first degree murder by a grand jury from which members of his race had been systematically excluded in violation of the Fourteenth Amendment to the United States Constitu-

tion, has waived his right to object in a subsequent habeas corpus action by pleading guilty to that indictment on the advice of counsel who was himself unaware of, and did not advise the defendant of, his right to object.

## STATEMENT OF THE CASE

Respondent and two other men were arrested in Nashville, Tennessee for the armed robbery and shooting of a liquor store employee, which occurred on January 22, 1948. When the victim died on February 12, 1948 [Of *pneumonia*, according to Respondent; See Petition for Writ of Habeas Corpus, A. 9], first degree murder indictments were returned by the Davidson County, Tennessee Grand Jury. The Grand Jury was at that time an all-white body; the first Negro to serve on said grand jury was not called until 1953.

Respondent signed a confession, but later claimed that the confession had been coerced. His mother retained counsel, and a plea of guilty was entered in March, 1948, resulting in a 99 year sentence. Neither he nor his attorney was aware at the time of the plea that blacks had been systematically excluded from grand jury service in Davidson County, nor that he had a right to object to the indictment on those grounds (A. 95-96).

In 1968, Respondent filed a habeas corpus action in the state court, alleging for the first time that he had been denied the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution in that members of his race had been systematically excluded from the grand jury which had indicted him. (A. 45-46) Proof at the evidentiary hearing established that no black was to serve on the Davidson County grand jury until 1953 (A. 102, A. 123, A. 142).

The trial judge was called as a witness and testified that Negroes on the jury list were designated by a mark of "colored" following their names, or merely "John Jones, C." (A. 105). The state trial judge in the habeas corpus action denied the petition, (A. 63-65), the Tennessee Court of Criminal Appeals affirmed (A. 143-A. 169), and the Tennessee Supreme Court, denied certiorari (A. 143).

Thereafter, Respondent filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Tennessee, Nashville Division, alleging the systematic exclusion issue. The District Court, relying on the records in the state proceeding, found for the Respondent on the issue of systematic exclusion (which was conceded by Petitioner to Respondent) and on the issue of whether Respondent had waived his right to object by entering a plea of guilty without first objecting to the indictment. The District Court granted the petition and ordered the release of Respondent (A. 21-A. 33). The United States Court of Appeals for the Sixth Circuit affirmed (Pet. cert. 1a-12a; 459 F.2d 237). This Court granted certiorari on October 16, 1972.

## SUMMARY OF ARGUMENT

The evidence adduced herein completely substantiates the findings below of systematic exclusion of blacks from the grand jury which indicted Respondent, a black man. Further, the Petitioner conceded in both the District Court, and in the Court of Appeals for the Sixth Circuit that blacks had been systematically excluded from that grand jury, and is thereby foreclosed from denying that fact before this Court.

Further, it is clear that Respondent did not waive his right to object by pleading guilty without first objecting

to the indictment. The rights involved, to the equal protection of the laws and to due process of law, are rights conferred on Respondent by the Fourteenth Amendment to the federal Constitution, and are therefore federal rights. Waiver of federal rights is a federal question, and the federal definition of waiver must be applied to the particular facts. Where, as here, Respondent is without knowledge of these rights, and his attorney is also unaware, and did not advise Respondent of the violation of his rights and of his right to object thereto, there cannot be an intentional relinquishment or abandonment of a known right or privilege, and, absent a showing of a deliberate trial strategy to intentionally bypass state procedural requirements, no waiver can be inferred or presumed. Further, where an indictment is returned by an unconstitutionally constituted grand jury, that indictment should be declared void rather than voidable, thereby rendering any plea thereto ineffective for any purpose, including as a basis for an inferred waiver of the defendant's rights.

## ARGUMENT

### I.

**BLACKS WERE UNCONSTITUTIONALLY EXCLUDED SYSTEMATICALLY FROM GRAND JURY DUTY IN DAVIDSON COUNTY, TENNESSEE WHEN RESPONDENT WAS INDICTED, AND PETITIONER ADMITTED THIS FACT IN BOTH THE DISTRICT COURT AND THE COURT OF APPEALS, THEREBY ABANDONING AND WAIVING HIS RIGHT TO ARGUE THAT ISSUE BEFORE THIS COURT.**

Petitioner contends herein that blacks were not systematically excluded from grand jury duty in Davidson County, Tennessee in 1948. Yet Petitioner *conceded* in both the District Court and in the Court of Appeals that blacks *were* systematically excluded from jury duty in violation of law, and elected to proceed in both courts solely on the issue of waiver.

The following is excerpted from Petitioner's brief in the Court of Appeals:

### STATEMENT OF THE CASE

The petitioner-appellee, hereinafter referred to as Henderson, was a black youth about twenty years of age when he was indicted by the Davidson County, Tennessee Grand Jury in 1948 on a charge of murder in the first degree. *Black people had been systematically excluded from grand jury duty prior to the time of Henderson's indictment and for some time after his indictment in 1948...*

. . . . . .

Henderson filed a petition for writ of habeas corpus in the United States District Court, Middle

> District of Tennessee, Nashville, Tennessee, on December 29, 1970, alleging among other things that his constitutional rights had been violated because blacks had been systematically excluded from the grand jury which indicted him. The respondent [Petitioner herein] *agreed that blacks had been systematically excluded* and that the only issue before the court was whether or not Henderson had waived his right to question the composition of the indicting grand jury by failure to object to the composition prior to entering the plea. [Brief of Petitioner herein, respondent in the Court of Appeals, Lewis S. Tollett, Warden, Sixth Circuit, pages 1-3; (Emphasis supplied).]

In the first excerpt from Petitioner's brief in the Court of Appeals, Petitioner admits as fact to the Court of Appeals that blacks were in fact systematically excluded from grand jury duty at the time Respondent was indicted, and Petitioner also admits that Respondent is black. In the second excerpted paragraph of that brief, Petitioner is admitting that he had conceded the same points in the District Court, and that Petitioner elected in the District Court to proceed solely on the issue of waiver.

The District Court found that not only had Henderson established his claim that blacks had been systematically excluded from the grand jury which indicted him, but that Petitioner had conceded the issue in Henderson's favor:

> [Tennessee] *concedes*—as it is apparent it must—that Henderson has proved everything necessary fully to support his contention that members of

> his race were systematically excluded from the grand jury which indicted him. [Tennessee] thus asserts "... that the only (remaining) issue is whether or not [Henderson] has waived his right to question the composition of the indicting grand jury ...," (A. 25-A. 26; Emphasis supplied).

Further, on appeal, the Court of Appeals for the Sixth Circuit found:

> The Respondent [Petitioner herein] *does not contest the finding of impermissible exclusion on appeal.* He bases the appeal *entirely* on the claim that Henderson waived any right to attack the indictment because he did not make his challenge before pleading to the charges and because he pled guilty to the indictment. (Pet. cert. 3a-4a; Emphasis supplied.)

The Court of Appeals found that the evidence adduced in the District Court completely and fully supported Henderson's contentions, and the District Court's finding of impermissible exclusion under the standards set by this Court in *Whitus v. Georgia* 385 U.S. 545 (1967), and by the Tennessee Supreme Court in *Bonds v. State*, 421 S.W.2d 87 (1967).[1]

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[1] The Sixth Circuit said (Pet. cert. 4a, n.2):

> The evidence showed that no Negro had served on the Davidson County Grand Jury in the years prior to 1948 and that no Negro was to serve on that panel until 1953, when a single Negro was called to duty: this despite the fact that Negroes made up over 25% of Davidson County's population. An explanation for this startling disparity may be found in the evidence. Proof at the hearing showed that whenever a Negro citizen's name appeared in the venire list from which grand jurors were selected by the county judges, a "c" or "col" abbreviation was placed before his name; officials were thus provided with a simple means of determining which citizens might be appropriately "excused" from grand jury

Respondent respectfully suggests that Petitioner, having conceded in Respondent's favor the issue of systematic exclusion in both the District Court and the Court of Appeals, has abandoned and waived his right to raise the issue in this Court, and is estopped from so doing. *United States v. Spector*, 343 U.S. 169, reh. den. 343 U.S. 951 (1952).

It has been decided that if an issue is conceded in the trial court it cannot be raised on appeal, *Drop Dead Co. v. S.C. Johnson & Sons, Inc.*, 326 F.2d 87 (9th Cir. 1963), cert. den. 377 U.S. 907. Further, issues not briefed nor argued in lower courts will not be considered by higher courts on appeal, *Walters v. City of St. Louis, Mo.*, 347 U.S. 231 (1954); *In re Donnelly's Estate*, 397 U.S. 286 at 294, n. 5 (1970).

The arguments made on pages 7-14 of Petitioner's brief herein concerning the term "systematic exclusion as it was understood in 1948," his citation of *Kennedy v. State*, 186 Tenn. 310, 210 S.W.2d 132 (1948), and his gratuitous suggestion that, due to *Kennedy, supra*, a challenge by Respondent to the illegal indictment would have been an "exercise in futility," were not raised, briefed nor argued in the District Court nor in the Court of Appeals. Petitioner now asks this Court to reverse two distinguished lower courts because they ruled adversely to him on issues which he had conceded to Respondent from the outset.

Petitioner's decision to concede to Respondent the issue of systematic exclusion in the lower courts was a laudable concession, fully supported by the evidence. But

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duty, It is apparent from the absence of any Negroes on the grand jury panels that the means were used and the impermissible end of exclusion accomplished.

Petitioner cannot now raise the issue for the first time before the Supreme Court. He elected to proceed below on the sole issue of waiver, and should be limited thereto here as well.

Respondent, nevertheless, feels constrained to respond to some of Petitioner's arguments on the systematic exclusion issue. For nearly a century, it has been fundamental that a criminal defendant is denied the equal protection of the laws if indicted by a grand jury from which members of his race have been systematically excluded solely on racial grounds. *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Whitus v. Georgia, supra.*; *Patton v. Mississippi* 332 U.S. 463 (1947); *Avery v. Georgia*, 345 U.S. 559 (1953); *Norris v. Alabama*, 294 U.S. 587 (1935); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Peters v. Kiff*, 407 U.S. 493 (1972).

This was the law when Respondent was indicted, and it was the law earlier that year when the case of *Kennedy v. State, supra.*, was decided by the Tennessee Supreme Court. Petitioner claims that the failure of the defendants in *Kennedy* to overturn their convictions on the systematic exclusion issue presented Respondent with a *fait accompli* which would have rendered any challenge by Respondent to his grand jury an "exercise in futility."

Petitioner is mistaken. The facts in *Kennedy* showed at best disproportionate representation of Negroes on the grand jury of Maury County, Tennessee, not systematic exclusion, although that was the claim. The opinion clearly shows that of one hundred nine prospective jurors, ten (about 9%) were Negroes. Further, several Negroes testified at the *Kennedy* hearing that they had served as jurors at the same term at which Kennedy was tried, and earlier, and that their names had been placed in

the jury box as early as 1944. The Tennessee Supreme Court held that the presence of these Negroes on the jury lists of Maury County, Tennessee indicated that there was no systematic exclusion of Negroes from jury service in that county.

In *Kennedy*,, the State also conceded that discrimination could be presumed from proof that no Negroes had been summoned for grand or petit jury service. The difference between *Kennedy* and the instant case is that in *Kennedy* Negroes had been called and in the instant case, Negroes had not been called to jury service. In Maury County there was no systematic exclusion, and in Davidson County, there was such exclusion. (See the opinion of the Tennessee Supreme Court quoted on pp. 10-12 of Petitioner's Brief.)

The Petitioner also second-guesses Respondent's trial counsel's "tactics" in his assertion that, in light of the confession given by the Respondent, the lawyer's "duty" to save his client's life by negotiating a plea of guilty in return for a life sentence, and the result in *Kennedy v. State, supra*, counsel had no other choice but to forego the objection to the illegal constitution of the grand jury.

The fatal flaw in this line of reasoning is that Respondent's attorney was *unaware* of the existence of the violation of Respondent's rights. His affidavit, unchallenged at any stage of these proceedings, clearly establishes that he was unaware of the right, of its violation, and that he did not advise Respondent of the right, its violation, and/or Respondent's right to object thereto. Since Respondent's attorney was unaware of his right to object there could not be, as Petitioner implies, a situation where "the attorney merely failed to inform his client of a single possible constitutional claim which he

thought best to use as coin for barter with the prosecution," Judge Clark dissenting in *Winters v. Cook*, 466 F.2d 1393 at 1402 (5 Cir. 1972).

Petitioner's analogy of the present case with the *Kagabein* case [*State v. Kagebein*, Arkansas Supreme Court #5665, presently pending on appeal], in which a fifteen year old boy was sentenced to death, is misplaced. Petitioner states: "Who is to say 24 years from now, an 'enlightened' society will not consider the exclusion of young people from grand juries as constitutionally infirm as the exclusion of any other minority?" The difference is, that when Respondent was indicted in 1948, the United States Supreme Court's ruling in *Strauder v. West Virginia, supra*, had already been the law of the land for *sixty eight years*! The present case does not involve the application of recent standards to an old case; it involves the enforcement of fundamental and long standing constitutional principle upon a state which had seen fit to disregard that principle for almost three quarters of a century.

II.

**DID RESPONDENT'S FAILURE TO OBJECT BEFORE PLEADING TO THE INDICTMENT RETURNED BY A GRAND JURY FROM WHICH MEMBERS OF HIS RACE HAD BEEN SYSTEMATICALLY EXCLUDED IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT CONSTITUTE A WAIVER OF HIS RIGHT TO CHALLENGE THE COMPOSITION OF THAT GRAND JURY IN SUBSEQUENT FEDERAL HABEAS CORPUS PROCEEDINGS WHEN NEITHER HE NOR HIS ATTORNEY HAD BEEN AWARE OF THE RIGHT BEFORE THE PLEA WAS ENTERED?**

Petitioner has divided his argument in his brief into four sections. Respondent feels that there are actually two questions presented in Petitioner's brief and will discuss those issues accordingly, although Respondent will add a third issue which was briefed and argued in both lower courts, the validity of the indictment itself. All arguments advanced by Petitioner will be met in Respondent's brief.

**A. The Rule Requiring Challenge Before Plea.**

Respondent concedes that ordinarily, under both Tennessee law and federal law, a defendant must object to nonjurisdictional defects by motion or plea in abatement before entering a plea. *State ex rel. Lawrence v. Henderson,* 433 S.W.2d 96 (1968) and cases cited therein, Federal Rules of Criminal Procedure, Rule 12(b)(2).

Petitioner relies heavily upon the federal rule, and cites authority to the effect that a *federal* criminal defendant who failed to object to the venire before plea waived his

right to object to an improperly constituted grant or petit jury. But the constitutional right herein held to have been violated is the right to the benefit of the Equal Protection Clause of the Fourteenth Amendment, which states, in part: "... [no] *state* shall deny to any person within its jurisdiction the equal protection of the laws." This prohibition is only operative against the states. There is no federal right to the equal protection of the laws, *Washington v. United States*, 401 F.2d 915, 922 (DC, 1968).

As the District Court below concluded, the Equal Protection Clause "is thus inapplicable to the Federal Government, the Federal Judiciary and the Federal Rules of Criminal Procedure ... whatever it may be that a federal defendant waives under Rule 12(b)(2), it is clearly not the right to complain of a denial of equal protection of the laws by virtue of racially exclusive grand jury selection.... It follows that the waiver provision of Rule 12 is necessarily not analogous to the waiver which [Petitioner] asserts was made by this [Respondent]: the practice in federal court has no bearing whatever on the issue presently before this court, and the cases cited by [Petitioner] are inappropriate in the present context. [A. 30]." The District Court also pointed out that even Rule 12 provides that the court may grant relief from the implied waiver. [A. 28]

### B. The Rationale of the State Prisoner Habeas Cases.

The fact situation involved herein is not a situation of first impression in the Federal Courts. Four circuits have been confronted with federal habeas corpus actions by state prisoners challenging convictions in which members of their races were systematically excluded from their grand or petit juries, or both, and in which no objection

was made to the venire before plea or trial in the state courts. The objections in each were first raised in habeas corpus or other post-conviction proceedings, and in each case were countered with allegations that the state prisoner had waived his right to raise the issue by virtue of proceeding to plea or trial in the state court without raising the issue. *Wade v. Yeager*, 377 F.2d 841 (3d Cir. 1967); *McNeil v. State of North Carolina*, 368 F.2d 313 (4th Cir. 1966); *Cobb v. Balkcom*, 339 F.2d 95 (5th Cir. 1964); *Winters v. Cook, supra.*, and the instant case, *Henderson v. Tollett, supra.* (6th Cir. 1972). The Fifth Circuit, encompassing most of the deep South, has decided many cases involving the questions presented herein. See e.g., *Colson v. Smith*, 438 F.2d 1038 (1971); *United States ex. rel. Goldsby v. Harpole*, 263 F.2d 71 (1959), cert. den. 361 U.S. 838; *Labat v. Bennett*, 365 F.2d 698 (1966), cert. den. 386 U.S. 991; *Windom v. Cook*, 423 F.2d 721 (1970); *Whippler v. Balkcom*, 342 F.2d 388 (1965).

The cases decided have certain facts in common. In each, there was systematic exclusion of members of the defendant's race from either the grand jury which indicted him, the petit jury which tried him, or both.[2] In each, the defendant was unaware of the denial of his rights at the time when the state procedure require him to raise his objection. In some cases the defendant's trial counsel was aware of the violation of the defendant's rights in time to make the objection, and in others [including the instant case] trial counsel was unaware of

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[2] Except in *Peters v. Kiff, supra.*, in which a *white* man objected because *Negroes* had been systematically excluded. The Fifth Circuit ruled that he had not been prejudiced; the Supreme Court disagreed and reversed.

the violation, of the right to object, or both. In all of the cases, the right was first asserted after conviction and sentence and after the time required by the respective state procedural rules and statutes had expired.

In all cases where the defendant himself was unaware of the fact that he had been denied the equal protection of the laws because members of his race were systematically excluded from his grand or petit jury, the federal courts have granted him the relief he sought. These courts have used the same rationale: the right asserted is to the equal protection of the laws guaranteed by the Fourteenth Amendment;[3] since waiver of federal rights is a federal question, *Fay v. Noia*, 372 U.S. 391 (1963), the federal courts have jurisdiction and have applied the "classic" definition of waiver of federal rights which was announced in *Johnson v. Zerbst*, 304 U.S. 458 at 464 (1938): did the defendant's conduct amount to "an intentional relinquishment or abandonment of a known right or privilege?"

To the ubiquitous objection by state authorities that the habeas applicant should be bound by the failure of his trial counsel, in pleading guilty or proceeding to trial without making a timely objection to the tainted indictment, the courts have held that "a choice made by counsel not participated in by the [habeas] petitioner does not automatically bar relief," *Fay v. Noia, supra.*, and have held that the habeas petitioner is not bound by acts of counsel unless "at a minimum counsel's actions should involve 'a *deliberate* choice of strategy' amounting

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[3]Some decisions have also included the right of due process as provided in the Fourteenth Amendment in addition to or even instead of the right to equal protection. *McNeil v. North Carolina, supra.; Cobb v. Balkcom, supra., Peters v. Kiff, supra.*

to an intentional 'bypassing' of state procedures. *Henry v. Mississippi* 379 U.S. 443,451 (1965); *Fay v. Noia, supra.*" *Henderson v. Tollett*, Opinion, Pet. Cert. 7a.

Generally, a voluntary guilty plea, entered upon the advice of competent counsel, implies an intentional and knowing abandonment of rights, *United States ex. rel. Rogers v. Warden of Attica State Prison*, 381 F.2d 209 (2d Cir. 1967). This Court has also held that where the advice given by counsel was "within the range of competence demanded of attorneys in criminal cases," the plea of guilty would not be set aside, *McMann v. Richardson*, 397 U.S. 749 at 771 (1970).

As the Sixth Circuit said below, however, "That line of cases [referring to *McMann, supra.*, and *Brady v. United States*, 397 U.S. 742] did not establish a new general test for examining conduct alleged to constitute a waiver of federal rights; in fact, it reemphasized the importance of *Johnson v. Zerbst* [supra.] as the governing authority on the subject." (Pet. Cert. 10a-11a, n.5). The Sixth Circuit indicated that *Brady, supra.*, and its related cases dealt with inaccurate legal advice and its effect upon a guilty plea which was sought to be vacated because it was involuntary, and are thus distinguishable from the case at bar, in which no challenge to the plea itself has been made.[4]

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[4]The Sixth Circuit discussed the inapplicability of *Brady, supra.*, and its related cases to the present situation at length [Pet. Cert. 11a n.5 (Continued from page 10a)]:

> That line of cases did not establish a new general test for examining conduct alleged to constitute a waiver of federal rights; in fact it reemphasized the importance of Johnson v. Zerbst, 304 U.S. 458, 464 (1938), as the governing authority on the subject. See Brady v. United States, 397 U.S. at 748 n.6. It did not suggest that a valid guilty plea waived the right to challenge all pre-pleading defects when a defendant

*Fay v. Noia, supra.*, established that mere failure to comply with a state procedural requirement does not constitute, necessarily, a waiver of rights bestowed by the United States Constitution. It also established that the finding of such a waiver by a state court does not bar the federal courts from independently determining the issue of waiver in a federal habeas corpus proceeding, since waiver of federal rights is a federal question; that a choice of counsel not participated in by the defendant would not automatically bar relief; and that actions or inaction of counsel would be imputed to the defendant alleged to have waived the state procedural requirement only where it appears affirmatively that the acts or omissions constituting the purported waiver were knowingly and voluntarily participated in by the accused as a deliberate strategy intended as a bypass of a known state procedural requirement. Further, the showing of the defendant's participation must be affirmative, as "acquiescence in the loss of fundamental rights is not to be presumed," and the Courts must "indulge every reasonable presumption

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neither knew nor could have known of the right at the time he entered his plea. It did not deal with a situation in which counsel's advice was competent judged by the time and place at which it was given, but grossly inadequate in light of the clearly established constitutional law of the period.

The Brady line of cases dealt only with challenges to the guilty plea itself; no such challenge has been made here. For this reason alone we believe that Brady and its successors cannot govern our decision here. Given the uniqueness of the concerns which necessarily affect any evaluation of the validity of a guilty plea in our system (see Brady, 397 U.S. at 749-59; McMann, 397 U.S. at 774) the Brady line of cases cannot provide a useful model for the practical application of the Johnson v. Zerbst standards in general. See the excellent discussion of this point in United States v. Liquori, 430 F.2d 842 (2d Cir. 1970); cf. Scogin v. United States, 446 F.2d 416 (8th Cir. 1971); Bannister v. United States, 446 F.2d 1250 (3d Cir. 1971).

against waiver," *Johnson v. Zerbst*, *supra.*; waiver cannot be presumed from a silent record, *Carnley v. Cochran*, 369 U.S. 506 (1962).

Recently, these principles were reaffirmed by this Court in *Humphrey v. Cady*, 405 U.S. 504 (1972). That unanimous decision [In which, however, Justices Powell and Rehnquist did not participate] reiterated that a purported waiver of a federal Constitutional right by not pursuing state remedies must be "the product of an understanding and knowing decision by the [federal habeas corpus] Petitioner himself, who is not necessarily bound by the decision or default of his counsel." The Court went on to hold that there can be a waiver only where the Petitioner himself "made a deliberate, strategic waiver of his claim in State Court."

Finally, in its most recent jury exclusion case, *Peters v. Kiff*, *supra.*, the Supreme Court upheld a federal habeas Petitioner's claim of racial exclusion *even though the claim was not raised at any time in the state courts.*[5]

Respondent concludes from *Peters v. Kiff*, *supra.*, that failure to object to the composition of the grand or petit jury in the state court does not constitute waiver of the right to object in a later federal habeas corpus proceeding.

### C. The Facts in the Instant Case Clearly Show that the Judgment Below Should Be Affirmed.

There is no real dispute that in the instant case blacks were unconstitutionally excluded from the grand jury which indicted Respondent; that Respondent was

[5]The fact that systematic exclusion was first raised in the federal habeas corpus action was only briefly noted in footnote 1 of the opinion of Mr. Justice Marshall, and was briefly commented on in the footnote to the Chief Justice's dissent.

unaware of the violation of his rights and of his right to object there to until years after the conviction and sentence (A.88); that his trial counsel was unaware that blacks had been systematically excluded from grand jury service; and that counsel did not advise Respondent of his rights, that the rights were violated, and that he had a right to object to the indictment. Both Respondent and counsel were without knowledge of this "substantial constitutional right." (Pet. Cert. 10a-11a).

The Respondent at the time of his indictment was a 20 year old black youth who had had less than a sixth grade education. His failure to object to the indictment cannot be held to have been an intentional abandonment of a known right or privilege. One cannot be said to have waived a right, the existence of which was unknown to him at the time of the alleged waiver.

Waiver cannot be imputed to Respondent due to the acts or omissions of his counsel. Since counsel was unaware of the right or its violation, he cannot be said to have made a deliberate decision to waive the right to object as a matter of trial strategy in an attempt to bypass state procedural requirements; and, at any rate, such an attempt to bypass state procedures will not be construed as a waiver unless it is shown that Respondent had knowingly participated in the decision to proceed without making the objection, while fully aware of his right to object. *Fay v. Noia, supra.*

Petitioner's argument assumes what has not been proven: that Respondent's counsel knew of the right and deliberately failed to object to its violation. There is no evidence whatsoever to permit such an inference. Yet even if such were the case, *would* counsel have advised Respondent of the right? As Judge Galbreath said in the

concurring opinion of the Court of Criminal Appeals of Tennessee, which denied relief to Respondent, "No lawyer in this state would ever have thought of objecting to the fact that Negroes did not serve on the grand jury in Tennessee in 1948," *State ex. rel. Henderson v. Russell*, 459 S.W.2d 176, 179 (1970).

Moreover, as stated by the Fifth Circuit in *United States v. Harpole, supra.*, at page 82:

> As Judges of a circuit comprising six states of the deep South, we think that it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries.

Several years later, in *Whitus v. Balkcom*, 333 F.2d 496 (1964), at 507, the same Circuit stated:

> The fact, standing alone, that no Negro has ever served on a jury in the particular county where his case is tried strongly indicates, if it does not create a presumption, that there was a tacit agreement by the bar of that county not to raise the constitutional issue. In such case the Negro would have no adequate remedy.

In *Winters v. Cook, supra.*, the Fifth Circuit ruled that Winters [the habeas petitioner], who had no idea that he could object to the jury composition, did not waive his right to raise the issue later, even though the right was known to his counsel, who did not object, ostensibly on tactical grounds. The Court said, at 1396, "That white lawyers representing black clients often fail to raise an objection to jury composition has been recognized as a problem in this circuit." In footnote 2 on the same page, the court stated ". . . such an extreme discrimination could not exist *without the knowledge of the State trial*

*judge*. It was his *duty* to ascertain that Winters had knowledge of his relevant rights." (Emphasis supplied.) [The Fifth Circuit based its decision in part on the invalidity of Winters' guilty plea which was given without knowledge of the right to object. That issue is not relevant herein, the validity of Respondent's plea not having been challenged below.]

The language quoted from the State court herein and the Fifth Circuit cases raises sinister implications: that even if Respondent's lawyer knew of the violation of his client's right in time to object, as Petitioner incorrectly argues, does it necessarily follow that the failure to object was a trial tactic? It would seem more likely that failure to object in Tennessee in 1948 resulted from a conspiracy, however tacit [perhaps even subconscious] among the bar and even the bench, to refrain from asserting this right which was peculiar to Negroes at that time[6].

Petitioner relies on the reasoning of Judge Clark in his dissent in *Winters v. Cook, supra*. That reasoning does not apply herein, as in the *Winters* case trial counsel was fully aware of the impermissible exclusion of blacks from jury service in time to make an objection, and in the instant case, Respondent's trial counsel had no idea of Respondent's rights, much less of the fact that they were violated. In *Winters*, trial counsel used the possibility of objecting to the venire as a negotiating lever to obtain a favorable plea bargain for the defendant. Such was not the case herein. Judge Clark wrote, at page 1399:

> Counsel testified that these constitutional objections were the "pry bar" that he used in getting the state to allow the defendant to enter a guilty plea. . . .

[6]Until June 22, 1972, when *Peters v. Kiff, supra.*, was decided.

> Where, as here, a privately retained lawyer who is well-versed in the defense of murder charges *deliberately* refrains from making a *known* constitutional objection to the composition of the jury in exchange for important and material concessions from the prosecution, *there has been a deliberate by-pass and waiver under Fay and Henry.* (Emphasis supplied.)

Clearly, the result below is not inconsistent with the position taken by Judge Clark in *Winters*. In the instant case there is no evidence of deliberate bypass of state procedure by Respondent's counsel. There is absolutely nothing in the evidence that shows an intent to waive a right to achieve a strategic advantage. There is no showing that counsel had made positive use of the constitutional right in any manner. There is no showing that either Respondent or his attorney were aware of the right or of its violation. There is consequently no waiver of Respondent's right to raise the systematic exclusion issue in federal habeas corpus proceedings, which he has done.

It was established beyond doubt in the evidentiary hearings below that Respondent was not aware of his right to object to the composition of the indicting grand jury at any stage of the proceedings. There was no deliberate choice by either Respondent or his counsel which could conceivably be interpreted as an intentional relinquishment of a known right, nor was there any indication of any intentional bypassing of state procedures. Hence, there was no waiver and the decisions below should be affirmed.

## III.

## DOES SYSTEMATIC EXCLUSION OF MEMBERS OF A PARTICULAR RACE FROM JURY SERVICE CONSTITUTE A JURISDICTIONAL DEFECT?

The District Court herein concluded that the indictment herein, having been returned by a grand jury from which blacks had been systematically excluded, was void, and, since a void indictment confers no jurisdiction upon the trial court, a plea to such an indictment is of no legal effect. [A.26], citing *Bonds v. State, supra.* In *Colson v. Smith*, 315 F. Supp. 179, affirmed at 438 F.2d 1075 (5 Cir. 1971), the Atlanta District Court followed the same reasoning. The Courts of Appeal in each case indicated that in their views, while the petitioners were entitled to relief because there was no waiver under *Zerbst* and *Fay*, the indictments were not void, but voidable. Yet, in *Patton v. Mississippi, supra.*, and again in *Eubanks v. Louisiana, supra.*, this Court held that indictments returned by grand juries from which members of a given race had been systematically excluded "cannot stand", as to any member of the excluded race indicated by such a grand jury.

In *Peters v. Kiff, supra.*, this Court said: "if ... Negroes were systematically excluded from ... grand ... juries, then he was indicted and convicted by tribunals that fail to satisfy the elementary requirements of due process, and *neither the indictment* nor the conviction *can stand.*" (Emphasis supplied.) Since Peters raised the issue for the first time in a federal habeas corpus proceeding, the time for objecting to a nonjurisdictional defect had long since passed. The question arises: does *Peters v. Kiff* mean that systematic exclusion gives rise to a jurisdictional defect, rendering the indictments and convictions of impermissibly constituted juries void *ab initio*?

Such a ruling would simplify cases such as the instant case. If indictments returned by such juries were void, the right to object could never be waived by pleading to a void indictment. Public policy might be served by accomplishing what 18 U.S.C. §243 [providing criminal penalties for public officials convicted of discriminatory jury selection] has apparently failed to do—terminate once and for all the deplorable practice of excluding minority groups from jury service. At least one circuit is waiting for a determination of this issue. In note 1 of its opinion in *Winters v. Cook*, supra., the Fifth Circuit said:

> We do not reach the issue whether a jury from which blacks are systematically excluded constitutes a jurisdictional or a nonjurisdictional defect. Although it was strongly intimated in *Colson* [*v. Smith*, 438 F.2d 1075] that where Negroes are excluded from the jury the defect is nonjurisdictional, the Supreme Court has recently ascribed such fundamental status to the right to be tried by a jury from which Negroes are not systematically excluded that we have some doubt as to the validity of the implications in *Colson*. Citing *Peters v. Kiff*, supra.

It would seem that the quoted language from *Patton* and *Peters v. Kiff* would indicate that indictments returned by improperly constituted grand juries, from which members of minority groups are systematically excluded, are void. Yet this Court has not yet so ruled specifically. Precedent and public policy would seem to require such a ruling.

## CONCLUSION

It is respectfully submitted that the facts of this case fall squarely within the purview of *Fay v. Noia, supra.*, and *Johnson v. Zerbst, supra.* In order to give Petitioner

the relief demanded, this Court will necessarily have to overrule *Fay* and *Zerbst*, on which countless decisions have been based. *Zerbst* alone has been cited in more than *three thousand* reported cases since it was announced. The Court will also have to redefine waiver and will have to reexamine and determine new standards for federal review of allegedly unconstitutional state action. A reversal here will effectively remove the jurisdiction of the federal judiciary in areas where state and local government will have the last word in interpreting its own alleged violation of the United States Constitution. Past experience indicates that, if such occurred, the Bill of Rights would soon be rendered meaningless in many jurisdictions.

The Petitioner insists that if Respondent prevails herein, "the floodgates would be open," and a horde of convicts would descend upon Davidson County, Tennessee, creating an intolerable burden on that County to retry or release these prisoners. It is somewhat ironic that the very authority, which deliberately violated Respondent's rights in imprisoning him for almost a quarter century, now begs the Court for relief because such a result would inconvenience that authority. The judgment below should be affirmed, and Respondent ordered released or retried within a reasonable time.

Respectfully submitted,

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